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April 15, 2002

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Office of the Secretary
236 Massachusetts Avenue, NE
Suite 110
Washington, DC 20002

Re: In the Matter of Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Polices Released, December 21, 2001, MM Docket No. 98-204

Dear Ms. Salas:

Enclosed is an original and four copies of the comments from the Lawyers' Committee for Civil Rights Under Law and People for the American Way Foundation. We are also forwarding a disk to Wanda Hardy and another to Qualex International

Sincerely,

Michael L. Foreman
Employment Discrimination Project Director

Enclosures

cc: Ms. Wanda Hardy
Qualex International

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Before the Federal Communications Commission
Washington, D.C. 20554

In the Matter of
Review of the Commission's
Broadcast and Cable
Equal Employment Opportunity
Rules and Policies Released, December 21, 2001

MM Docket No. 98-204

COMMENTS OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AND PEOPLE FOR THE AMERICAN WAY FOUNDATION

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The Lawyers' Committee for Civil Rights Under Law and the People for the American Way Foundation respectfully submit the following comments regarding the Federal Communication Commission's ("the Commission's") request for comments concerning MM Docket No. 98-204, and its Second Notice of Proposed Rule Making ("NPRM") proposing to adopt a revised policy affecting equal opportunity policy in the broadcast and cable industries.

I. THE INSTITUTIONAL INTERESTS

A. The Lawyer's Committee for Civil Rights Under Law

The Lawyers' Committee for Civil Rights Under Law ("LCCR") is a tax-exempt nonprofit civil rights organization that was founded in 1963 by the leaders of the American bar, at the request of President Kennedy, to help defend the civil rights of racial minorities and the poor. Its Board of Trustees presently includes several past Presidents of the American Bar Association, past Attorneys General of the United States, law school deans and professors, and many of the nation's leading lawyers. It has independent local affiliates in Boston, Chicago, Denver, Los Angeles, Philadelphia, San Antonio, San Francisco, and Washington, D.C.

Through the LCCR and its affiliates, hundreds of attorneys have represented thousands of clients in civil rights cases across the country, including a large number of cases challenging racial discrimination in virtually all aspects of American life. The LCCR, through its Employment Discrimination Project, is keenly interested in the development of employment discrimination law. Because of that interest, LCCR has been actively involved in the litigation of employment cases both as party counsel and as amicus at the trial level, in the appellate courts and the United States Supreme Court. The LCCR likewise has been involved in the development

and passage of the significant civil rights statutes of this era, and in the development and refinement of the law concerning affirmative action both in the workplace and in other aspects of our society.

B. The People for the American Way Foundation

People For the American Way Foundation ("PFAWF") is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism and liberty PFAWF now has over 500,000 members and supporters across the country. PFAWF has been actively involved in efforts to combat discrimination and to ensure equal protection of the laws to all Americans through adoption and enforcement of strong civil rights laws and regulations. People For the American Way filed comments in the last rulemaking concerning adoption of EEO broadcast rules by the FCC and its Foundation served as co-counsel for intervenors in the subsequent litigation seeking to uphold the constitutionality of those rules.

The LCCR and PFAWF submit these comments in order to vindicate the fundamental constitutional and civil rights principles and interests at stake in the current rulemaking.

II. INTRODUCTION AND SUMMARY OF POSITION

The LCCR and PFAWF are well aware of the Commission's well intentioned and constitutionally required efforts to implement an equal employment policy that attempts to promote diversity in the broadcast industry. We are equally aware that these efforts have repeatedly been rebuffed by the D.C. Circuit Court of Appeals' artificially narrow and, indeed, legally wrong, construction of the limits of affirmative action. The Commission's caution in

moving forward in this area is well understood. While we are thus generally supportive of these revised rules, we respectfully urge the Commission to do more. The separate statement of Commissioner Michael J. Copps at the time of the issuance of the "Second Notice of Proposed Rule Making" most eloquently summarizes our position on the revised rules.

> [We] do not feel that [the proposed revised rules] reflect[ ] the deep and passionate commitment to a diverse workplace that America must have if it is to fulfill its potential. Our Country's strength *is* its diversity. Diversity is not a problem to be accommodated; it is an opportunity to be developed. We will succeed in the Twenty first century not in spite of our diversity, but because of our diversity.

NPRM, at 31.

While we recognize the Commission's reluctance vigorously to pursue equal employment opportunity in the broadcasting industry in light of the D.C. Circuit's extraordinary activism in this area, we believe that it is for this very reason that the Commission must be especially vigilant in opening doors that remain closed to minorities including in the distribution of broadcast licensing. What data that are available demonstrate that the need remains great.

- A recent study by the National Telecommunications and Information Administration finds minorities remain consistently underrepresented among commercial broadcast owners. Although minority ownership hit a high of 3.8% ownership of commercial broadcast facilities in 2000, the difference compared to minority representation in the national population – 29% – is staggering.[1]

- Television station ownership among minorities decreased in 2000 (to 23 full power stations, or 1.9% of the nation's 1,288 such stations).[2]

- Discrimination in the advertising industry against minority-owned and -formatted stations (including withholding advertising and requiring minorities to accept discount pricing on advertising spots) contributes to the exclusion of minority and women-owned businesses from information and business networks.[3]

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[1] National Telecommunications and Information Administration, U.S. Department of Commerce, *Changes, Challenges and Charting New Courses: Minority Commercial Broadcast Ownership in the United States* (2000).

[2] *Id.*

[3] Ivy Planning Group, LLC, *Whose Spectrum Is It Anyway? Market Entry Barriers, Discrimination, and*

- Minority broadcast license holders are less likely to be accepted in their applications for debt financing, minority borrowers pay higher interest rates on their loans, and minorities are less likely to win spectrum auctions than non-minorities - all determined after controlling for other relevant factors.[4]

This reality leads the LCCR and PFAWF to endorse firmly the continuation of the outreach and recruitment, and particularly the data collection and reporting requirements the revised rules include. Proposed methods by which these revised rules can be further enhanced to promote diversity while ensuring they survive constitutional scrutiny are discussed in great detail in "Comments of EEO Supporters by David Honig, Executive Director of the Minority Media and Telecommunications Council," filed April 15, 2002 and will not be repeated here. We do wish, however, to highlight the importance of several specific measures we believe essential to ongoing efforts.

- Maintaining the collection of Form 395 data on the racial, ethnic, and gender composition of the broadcasting industry;
- Pursuing formal study of the demographic data already accumulated to determine whether more aggressive outreach programs may survive the current exacting standards of constitutional scrutiny;
- Ensuring that data collection and reporting requirements include the tracking of recruitment sources and hires;
- Limiting the rules exemption for small broadcasters to companies of five or less.

Because the revised rules have been promulgated as a result of two decisions by the Federal Court of Appeals for the D.C. Circuit holding prior such rules unconstitutional, the comments below focus on the constitutionality of the revised rules. LCCR and PFAWF

Changes in Broadcast and Wireless Licensing (2000).

[4] William D. Bradford, *Discrimination in Capital Markets, Broadcast/Wireless Spectrum Service Providers and Action Outcomes* (2000).

emphasize that the current rules pose no constitutional concerns, and that, even under the strict level of scrutiny applied by the D.C. Circuit, the rules fall well within the strictures of the equal protection component of the Due Process Clause of the Fifth Amendment.

First, the revised rules are not subject to strict constitutional scrutiny under the Fifth Amendment. The outreach and data collection and reporting rules, summarized below, do not constitute racial classifications, nor do they inevitably impose a racially disparate impact in their effect. The Supreme Court has expressly approved outreach programs that are race neutral in nature – even those that do have a racially disproportionate effect – and the vast majority of lower courts to consider the issue have held the same. Likewise, data collection and reporting requirements – even those requiring the collection of information about race – are part and parcel of dozens of federal statutes and programs, and have never been held to impose a racial "classification" of any kind. Accordingly, such requirements may be reviewed only to ensure that the government has a rational basis in imposing them, a test the Commission can manifestly satisfy here.

Second, even if strict scrutiny were applied to the revised rules, the rules would pose no concerns under the Fifth Amendment. It is well settled that the government has a compelling interest in preventing and deterring impermissible discrimination. The Supreme Court has long recognized that the government may not become a passive participant in maintaining a system that discriminates on the basis of race. Indeed, the rule could hardly be otherwise without putting the government in an impossible Catch-22 – caught between the constitutional mandate to protect citizens against discrimination, and a litigation position that would prohibit heading off any such discrimination at the pass. Heading off this unlawful discrimination is what the

Commission's equal opportunity rules seek to do here: ensure that it has not created a licensing system closed to certain segments of the population on account of race.

Finally, even if strict scrutiny applied, the rules are exceptionally narrowly tailored. Far from the D.C. Circuit's concern that broadcasters feel pressured to discriminate on the basis of race, the outreach provisions in the revised rules are wholly neutral with respect to race. Likewise, the data collection and reporting requirements, as the Commission has repeatedly emphasized, are not tied to broadcasters' equal employment opportunity obligations and will not be used by the Commission for enforcement. Instead, applying the typical concerns of the "narrow tailoring" inquiry, broadcasters are given a flexible choice of possible outreach efforts to undertake, are required no more than once a year to make reports on their progress, and are not asked to *limit* or *abandon* any existing methods of recruitment or hiring. The rules thus have no "non-beneficiaries" who stand to lose some benefit to which they are entitled. By requiring broadcasters to take steps beyond what they currently do to recruit and publicize job openings to applicants not currently "in the loop," the rules are targeted at achieving no more than precisely the compelling interest they serve: deterring and preventing impermissible discrimination by broadening the pool of possible recruits.

III. THE IMPACT OF THE REVISED RULES

In addition to maintaining the Commission's longstanding prohibition against discrimination in broadcast and cable employment, the revised rules set forth two broad categories of obligations: (1) recruiting and outreach, and (2) data collection and reporting. The outreach requirements adopt a three-pronged approach to promoting equal employment opportunity, including the broad dissemination of information about full-time job vacancies; notice of such vacancies to

organizations that have requested such notice; and completion of a limited number of longer-term recruitment efforts comprising, for example, participation in job fairs, scholarship and internship programs, and community information events. NPRM, at 5-6. None of the requirements involves efforts targeted at (or even necessarily including) particular ethnic groups or women.

The data collection and reporting obligations under the revised equal opportunity rules are substantially similar to the previous rules and, as with the outreach requirements, *do not themselves require that covered entities collect data on the racial, ethnic, or gender composition of job recruits or employees*. Broadcasters would be required, as before, to file an annual public report including at least a list of job openings during the year, recruitment sources used to fill them, names and contact information of each recruitment source, and a description of any "supplemental" recruitment initiatives. In addition, broadcasters would still be required to file FCC Form 397 certifying compliance with the equal opportunity rules and attaching a copy of the latest annual report; however, this form need only be submitted in the fourth year of a license term, rather than the more demanding biennial submission previously required. And broadcasters would still be required to submit FCC Forms 396 and 396-A, broadly describing the station's compliance efforts and documenting any pending discrimination complaints.[5]

Finally, both broadcasters and cable system operators would retain obligations – mandated by federal law in the cable context, 47 U.S.C. § 554(d)(3) – to file forms with the FCC collecting data on the gender and ethnicity of the entity's workforce (Form 395-B for

[5] In some contrast, the data and reporting obligations of cable operators and other multichannel video programming distributors are constrained by federal law preempting contrary regulations. Despite this, such entities carry similar obligations to file annual reports under the federal Communications Act – obligations that the Commission has implemented and proposes to continue implementing through the filing of Forms 395-A and 395-M.

broadcasters, portions of Forms 395-A and 395-M for entities covered by the Communications Act). These obligations, as the Commission has repeatedly made clear, are not tied to the Commission's equal employment opportunity efforts. The forms are not used "for the purpose of assessing any aspect of an individual entity's compliance with the EEO rules." NPRM, at 15-16. Rather, the data will be used only to analyze industry trends and report accordingly to Congress.

The following comments are addressed to the constitutionality of these sets of outreach, data collection, and reporting requirements.

IV. THE COMMISSION'S REVISED RULES FALL WELL WITHIN THE STRICTURES OF THE EQUAL PROTECTION COMPONENT OF THE FIFTH AMENDMENT

The equal protection component of the Fifth Amendment precludes the federal government from discriminating on the basis of race, and from adopting any race-based classification that does not advance a compelling interest through means narrowly tailored to achieve that end. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995). The revised rules summarized above violate neither of these strictures. Because the rules are wholly neutral with respect to race, only passing scrutiny should be applied in evaluating their constitutionality. However, even if the strictest level of constitutional scrutiny were applied, the revised rules are extraordinarily narrowly tailored to achieve a set of compelling ends: preventing and deterring the very discrimination the Fifth Amendment prohibits.

A. Because The Revised Rules Are Race-Neutral, Strict Constitutional Scrutiny Does Not Apply

In the context of employment opportunity, strict constitutional scrutiny applies only where racial classifications are at stake. *Adarand*, 515 U.S. at 227; *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). Indeed, the D.C. Circuit itself recognized as much in *Lutheran*

Church-Missouri Synod v. FCC, 141 F.3d 344, 351 (regulations requiring stations to implement racially neutral recruitment programs not subject to heightened scrutiny), as well as in *MD/DC/DE Broadcasters Assoc'n v. FCC*, 236 F.3d 13, 18-19 (D.C. Cir. 2001) (leaving untouched the Commission's former "Option A" outreach requirements), the case prompting the Commission's latest rule revision.

Despite this simple principle, the D.C. Circuit appears to have concluded in *MD/DC/DE* that strict constitutional scrutiny applies even to race-neutral recruitment efforts if those efforts *might be perceived as having* the effect of "pressuring" non-governmental entities to divert some recruiting resources from some groups and toward others on account of their race. Id. This is simply not the law.6

1. Race-Neutral Outreach Programs Are Not Subject to Strict Scrutiny

The Supreme Court has made clear that race-neutral outreach programs that have the effect of increasing minority participation present no cause for heightened scrutiny. Croson, 488 U.S. at 510 (plurality opinion); id. at 526 (Scalia, J., concurring) (a state "may adopt a preference for small businesses, or even for new businesses – which would make it easier for those previously excluded by discrimination to enter the field").7 Thus, even though certain such programs "may well have racially disproportionate impact, [...] they are not based on race." Id. at

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[6] Indeed, the D.C. Circuit's error is apparent: the Court first evaluated the former rules with exacting scrutiny in order to determine what might be its potential effect, only then did it determine whether those rules should even be subject to such exacting scrutiny. See *MD/DC/DE Broadcasters Association*, 236 F.3d at 18-20 (evaluating effect of rule), 20-23 (determining whether strict scrutiny should apply).

[7] The Supreme Court's openness to race-neutral "preferences" has been adopted by the majority of lower courts to consider the question whether race-neutral outreach and recruiting provisions pass constitutional muster. *See, e.g., Ensley Branch, NAACP v. Seibels*, 31 F.3d 1548, 1571, 1583 (11th Cir. 1994); *Schurr v. Resorts Int'l. Hotel*, 16 F. Supp. 2d 537, 549 (D.N.J. 1998); *Shuford v. Alabama State Bd. of Educ.*, 897 F. Supp. 1535, 1553-54 (M.D. Ala. 1995).

526.

Such an interpretation is a matter of common sense. Recruiting efforts that focus generally on increasing the scope and size of the applicant pool do no cognizable harm to applicants already in the pool. As one court put it: "The only harm to white males is that they must compete against a larger pool of qualified applicants." *Duffy v. Wolle*, 123 F.3d 1026, 1039 (8th Cir. 1997); *see also* Note, *The Constitutionality of Proposition 209 As Applied*, 111 Harv. L. Rev. 2081, 2084 (1998) (outreach programs "[s]eek to equalize information among individuals by focusing on those groups that are not receiving information available to others").

Were the rule otherwise, every government measure that sought to prevent discrimination in a system of allocating government rights would be subject to the highest level of scrutiny – and would, only on the rarest occasions, be upheld. Such a rule would put the government in an impossible Catch-22. The federal government has both the authority and the "constitutional duty" to determine whether an agency or federal licensing scheme has the effect of breaching express provisions of federal law or of denying citizens equal protection of the law. *Associated Gen. Contractors of California, Inc. v. City and County of San Francisco*, 813 F.2d 922, 929 (9th Cir. 1987). As the Supreme Court has recognized, an understanding of strict scrutiny that would preclude the government from preventing such violations before they occur would leave the government "trapped between the competing hazards of liability to minorities if affirmative action is not taken to remedy apparent [...] discrimination and liability to nonminorities if affirmative action is taken." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 291 (1986). Moreover, such a result has the effect of diluting the "constitutional responsibilities of the

political branches [by saying] they must wait to act until ordered to do so by a court." *Croson*, 488 U.S. at 519 (Kennedy, J., concurring).

As even the D.C. Circuit recognized, the revised rules regarding recruitment and outreach do not impose "racial classifications" of any kind, much less classifications that threaten to disadvantage any particular group on the basis of race. The recruitment and outreach provisions summarized in the Commission's NPRM require, first, the broad dissemination of information about full-time job vacancies. The dissemination requirement makes no reference to any particular group toward which information is to be directed. Indeed, the mandate that employment information be distributed broadly serves precisely the opposite interest as a status quo system that might advantage one group over another. The outreach provisions further require that covered entities provide notice of job vacancies to organizations that have requested such notice. This is no more than an expansion of the broad dissemination prong. As with that prong, a contrary policy – permitting arbitrary or discriminatory denial of such information to an organization that requests it – would pose equal protection concerns of its own. Finally, the same analysis applies to the requirement that entities complete report on a limited number of longer-term recruitment efforts comprising, for example, participation in job fairs, scholarship and internship programs, and community information events. NPRM, at 5-6. None of the requirements involve efforts targeted at (or even necessarily including) particular ethnic groups or women.

2. Data Collection and Reporting Requirements Are Not Subject to Strict Scrutiny

Just as clear, government collection of data – even data about ethnicity or gender – poses no constitutional concern. It is *differential* treatment on the basis of a prohibited class, not

classification per se, that implicates equal protection. *Morales v. Daley*, 116 F. Supp. 2d 801, 813 (S.D. Tex. 2000) (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) ("The Equal Protection clause does not forbid classifications. It simply keeps decision makers from treating differently persons who are in all relevant respects alike.")). Accordingly, courts have historically approved the collection of data regarding the racial and gender composition of a federal agency workforce, *Sussman v. Tanoue*, 39 F. Supp. 2d 13 (D.D.C. 1999); the collection by the federal government of the racial composition of state employees, *United States v. New Hampshire*, 539 F.2d 277 (1st Cir. 1976), *cert. denied*, 429 U.S. 1023 (1976); and the collection of local census data regarding the racial and ethnic composition of public school employees, *Caufield v. Bd. of Educ.*, 583 F.2d 605 (2d Cir. 1968).

Critically, the mere possibility that such data will be used by the government for an impermissible purpose cannot, of itself, preclude the collection.

> [P]ossible and purely hypothetical misuse of data does not require the banning of reasonable procedures to acquire such data. Statistical information as such is a rather neutral entity which only becomes meaningful when it is interpreted. And any positive steps which the United States might subsequently take as a result of the interpretation of the data in question remain subject to law and judicial scrutiny.

New Hampshire, 539 F.2d at 280. Indeed, to conclude otherwise would have the effect of invalidating not only federal census requirements, but also countless other federal laws that currently mandate the collection of data on race, ethnicity, and gender.[8] Thus, data collection

[8] *See, e.g.*, Jury Selection and Service Act of 1968, 28 U.S.C. § 1869(h) (federal government must elicit race of all those considered for jury duty); 29 C.F.R. § 1602.7 (Title VII requirement of employers to provide such data about employees); 28 C.F.R. § 42.304 (1998) (Justice Department regulations requiring data collection on race and gender of job applicants and those hired); 12 C.F.R. § 268.601 (1999) (Federal Reserve System Board of Governors regulations collecting data on race and gender of agency employees); 7 C.F.R. § 272.6(g) (1999) (Agriculture Department regulations collecting data on race and ethnicity of food stamp recipients); 23 C.F.R. § 200.9 (1999) (Transportation Department regulations collecting data on race and gender of participants in state highway programs); 24 C.F.R. § 280.25 (1999)

requirements have been described as "conscious of race but devoid of ultimate preferences," *Tanoue*, 39 F. Supp. 2d at 27, and as such, as not subject to strict scrutiny.

Here, the data collection and reporting requirements in the revised rules are far removed from the realm of strict scrutiny. Covered entities are not required by the revised rules to collect data on the demographic composition of job recruits or employees. Rather, entities are required, as before, to submit annual public reports documenting their efforts to comply with the Commission's race-neutral outreach and recruitment provisions. Because these requirements – which themselves impose no classification or obligation with respect to race – are adopted to promote compliance with an underlying race-neutral policy and goal (to broaden the pool of qualified applicants and deter discrimination), the Commission is limited only by rationality constraints in adopting further reporting requirements.

The separate obligations held by broadcasters and cable to collect data on the gender and ethnicity of the workforce (Form 395-B for broadcasters, portions of Forms 395-A and 395-M for entities covered by the Communications Act) are no different from the myriad federal laws (some of which are cited above, in note 8) that require the collection of the very same data. As the Commission has repeatedly made clear, the data will not be used "for the purpose of assessing any aspect of an individual entity's compliance with the EEO rules." *Id.*, at 15-16. Rather, the data will be used only to analyze industry trends and report accordingly to Congress.

In light of the foregoing analysis, LCCR and PFAWF suggest that the Commission require compliance-related information in annual reports beyond that outlined in the revised rules. That additional information should include, at a minimum, tracking the recruitment

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(Department of Housing and Urban Development regulations on collection of race and ethnicity data on program beneficiaries).

sources for interviewees and hires. NPRM, at 11. As with the other requirements, such information will allow the Commission to obtain a more accurate assessment of whether its outreach programs are (a) being observed, and (b) being effective in broadening the pool of qualified applicants. Requiring this information presents marginal additional burden beyond that covered entities already face in collecting the same set of information for the annual reports already require

B. Even if the D.C. Circuit's Strict Approach Applies, The Revised Rules Pass Constitutional Muster

In *MD/DC/DE Broadcasters Assoc'n v. FCC*, 236 F.3d 13, 18-19 (D.C. Cir. 2001), the D.C. Circuit concluded that strict constitutional scrutiny would apply even to race-neutral federal recruitment efforts that *might* have the effect of "pressuring" non-governmental entities to divert some recruiting resources from some groups and toward others on account of their race. The revised rules, adopted in the wake of that decision, pose no such concern. More important, they are designed for the stated purpose of preventing and deterring discrimination, NPRM, at 5, a manifestly compelling government interest. Finally, the revised rules are tailored as narrowly as possible to promote the compelling interest in prevention and deterrence. Indeed, LCCR and PFAWF believe additional data collection and reporting requirements could be added and still remain within the bounds of strict scrutiny. Simply put, the revised rules remove the previously offensive "Option B" and leave intact the prior rules' "Option A" requirements – the portion of the rules the D.C. Circuit left untouched. There can be no question of their constitutionality.

1. The Government Has Compelling Interests in Preventing and Deterring Impermissible Discrimination

It is settled that preventing and deterring unlawful discrimination – indeed, that

promoting compliance with any federal law – constitute compelling government interests. The Supreme Court has made this clear in any number of contexts, particularly those in which the government actively participates in creating conditions of exclusion. Thus, as Justice O'Connor explained in *Croson*, "if the city could show that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of the local construction industry, we think it clear that the city could take affirmative steps to dismantle such a system."[9] Under the Commission's broadcast licensing scheme, it actively decides who may participate in the broadcasting system in this country, and the Commission is therefore well within its authority to ensure, *through the race-neutral means of seeking broad employment outreach*, that the system does not exclude potential participants on account of race.

In the broadcasting context in particular, a long history of exclusion of minorities gives the Commission ample cause to believe deterrence and prevention of discrimination are essential. Ensuring open access to the ownership and staffing of broadcast services has been a concern since the advent of commercial radio in this country. Despite this national interest, a recent study by the National Telecommunications and Information Administration – which has collected data on minority participation in the broadcast industry since 1990 – finds minorities remain consistently underrepresented among commercial broadcast owners. Although minority ownership hit a high of 3.8% ownership of commercial broadcast facilities in 2000, the difference compared to minority representation in the national population – 29% – is staggering. At the same time, television station ownership among minorities decreased in 2000 (to 23 full

[9] *Croson*, 488 U.S. at 492 (opinion of O'Connor, J.) (noting "compelling interest in assuring that public dollars [...] do not serve to finance the evil of private prejudice"); *id.* at 519 (Kennedy. J., concurring in part and concurring in the judgment); *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992); *United States v. Paradise*, 480 U.S. 149, 166 (1987); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976).

power stations, or 1.9% of the nation's 1,288 such stations). National Telecommunications and Information Administration, U.S. Department of Commerce, "Changes, Challenges and Charting New Courses: Minority Commercial Broadcast Ownership in the United States," (December 2000). The continuing, severe under-representation of minorities among the ownership and staff of licensed stations strongly suggests that the need for preventive anti-discrimination measures remains compelling.

In addition, detailed statistical and narrative studies in the past few years have documented discrimination in the advertising industry against minority-owned and -formatted stations (including withholding advertising and requiring minorities to accept discount pricing on advertising spots), excluding minority and women-owned businesses from information and business networks.[10] As concerning, minority broadcast license holders are less likely to be accepted in their applications for debt financing, minority borrowers pay higher interest rates on their loans, and minorities are less likely to win spectrum auctions than non-minorities – all determined after controlling for other relevant factors.[11]

2. The Revised Rules Are Narrowly Tailored, and Do Not Have the Effect of "Pressuring" Entities to Discriminate on the Basis of Race

The final hurdle to surviving strict scrutiny is a demonstration that the rules are narrowly tailored to serve the compelling interests just described. Adarand, 515 U.S. at 235. The narrowness of such a rule turns in part on the efficacy of possible alternative means, the definite duration of the rule, the rule's flexibility, the extent to which race is involved, and the effect of

[10] Ivy Planning Group, LLC, *Whose Spectrum Is It Anyway? Market Entry Barriers, Discrimination, and Changes in Broadcast and Wireless Licensing* (2000).
[11] William D. Bradford, *Discrimination in Capital Markets, Broadcast/Wireless Spectrum Service Providers and Action Outcomes* (2000).

the rule on non-beneficiaries. Croson, 488 U.S., at 507-510; Fullilove v. Klutznick, 448 U.S. 448, 510-16 (1980) (Powell, J., concurring).

In rejecting the Option B provisions of the prior rules, the D.C. Circuit held that the rule was not "narrowly tailored" because it required licensees to report the race of job applicants and thereby "place[d] pressure" on broadcasters to recruit minorities without a specific finding of past discrimination or reasonably likely future discrimination. MD/DC/DE, 236 F.3d at 15. Because applicants' race is relevant "only if the Commission assumes that minority groups will respond to non-discriminatory recruitment efforts in some predetermined ratio," the Court reasoned, Option B impermissibly pressured licensees to take race into account. Id. at 22.

No such concern exists here. As discussed above, the outreach provisions are neutral with respect to race. Likewise, the data collection and reporting requirements, as the Commission has repeatedly emphasized, are not tied to broadcasters' equal employment opportunity obligations under the revised rules.12 In any case, race-neutral outreach requirements coupled with detailed reporting requirements do not necessarily "assume" anything about the race of the newly recruited applicants. Even if the Commission were to use the collected data about race – which, again, it has said it will not – race is, at most, one data point among many the Commission will reasonably collect under the rules to compare the existing

[12]The Commission has said that annual employment reports will not be used as part of the EEO compliance process. We take this to mean that these reports will not be used to determine whether outreach efforts were effective. Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Process, Report and Order, MM Docket Nos. 96-16, 98-204, 15 FCC Rcd 2329, ¶ 6 ("The Commission will no longer use the employment profile data in the annual employment reports in screening renewal applications or assessing compliance with EEO program requirements. The Commission will use this information only to monitor industry employment trends and report to Congress."); *id.* ¶ 225 ("We . . . state in the clearest possible terms that we will not use the [Form 395-B] data to assess broadcasters' or cable entities' compliance with our EEO rules."). The Commission has not (nor could it) disclaim reliance on the cases that hold that statistical evidence relating to hiring is irrelevant to a case of intentional discrimination in hiring.

applicant pool to the applicant pool to determine what effect, if any, its revised rules have on the broadcasting industry as a whole. The revised rules assume nothing about the nature or direction of that effect.

Beyond this, the revised rules readily satisfy the criteria indicating narrow tailoring. Broadcasters are given a panoply of possible outreach efforts to undertake, are required no more than once a year to make reports on their progress, and are not asked to *limit* or *abandon* any existing methods of recruitment or hiring. The rules thus have no "non-beneficiaries" who stand to lose some benefit to which they are entitled. By requiring broadcasters to take steps beyond what they currently do to recruit and publicize job openings to applicants not currently "in the loop," the rules are targeted at achieving no more than precisely the compelling interest they serve: deterring and preventing impermissible discrimination by broadening the pool of possible recruits.

V. CONCLUSION

For the foregoing reasons, LCCR and PFAWF are persuaded that the proposed rules fall well within established constitutional equal protection standards. The words of Commissioner Michael J. Coops again aptly summarize our position. The Commission "can push the envelope farther than this and still be within the safe harbor of legal and judicial boundaries. The Constitution has brought us a long way in civil rights and equal opportunity in the past half century, and [we] just don't believe it's out of gas yet." NPRM p. 32.

Respectfully Submitted On behalf of the
Lawyers' Committee for Civil Rights

Under Law and People for the American Way Foundation

Michael L. Foreman, Director
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